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IN THE

Supreme Court of the United States

October Term, 1959

No. 554

UNITED STATES POTASH COMPANY,
DIVISION OF UNITED STATES
BORAX & CHEMICAL CORPORATION,
Petitioner,

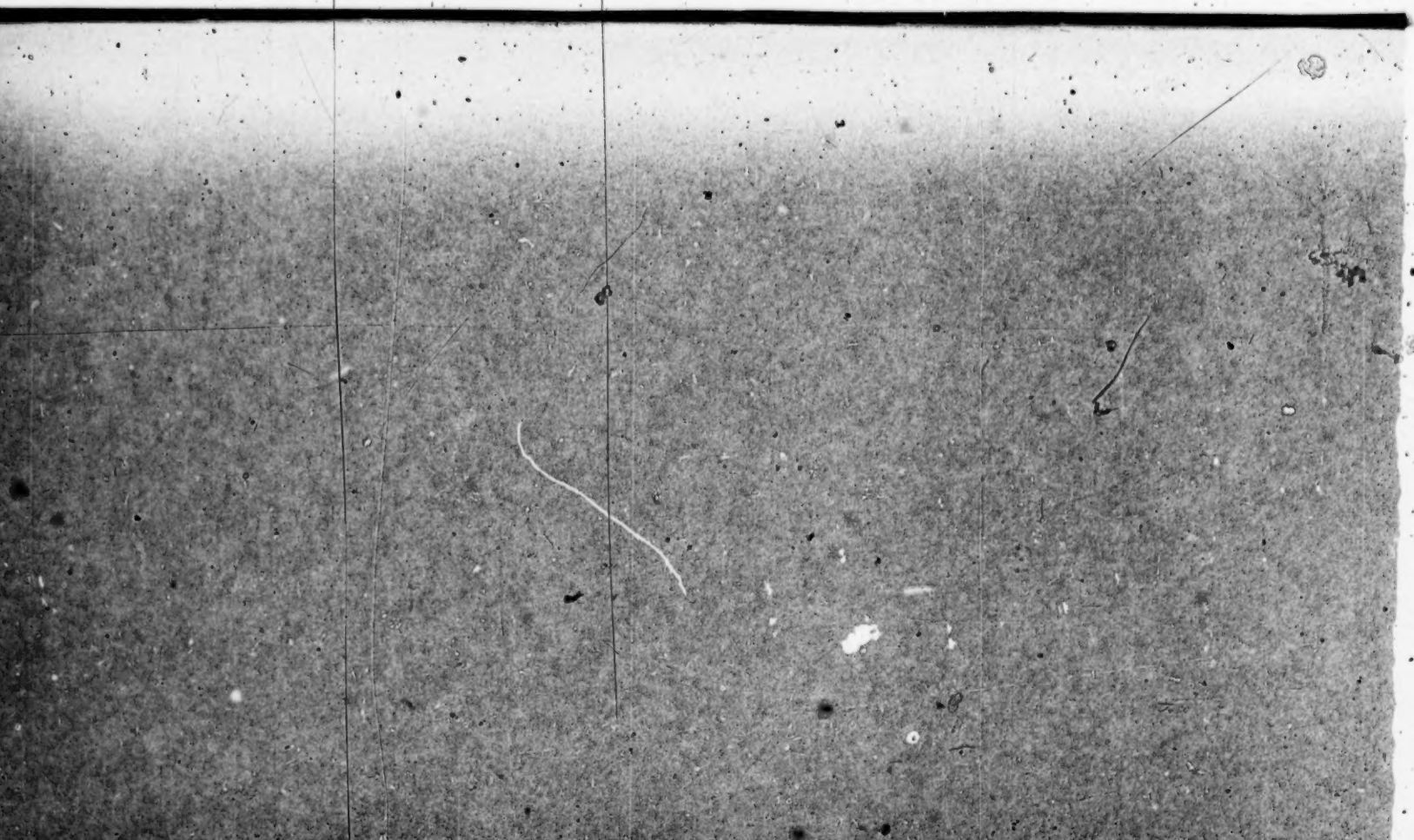
v.

LOCAL 1912,
INTERNATIONAL ASSOCIATION OF MACHINISTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

RUFUS G. POOLE
ROBERT C. POOLE
Suite 715, Simms Building
Albuquerque, New Mexico
RAY J. COLEMAN
EDWIN A. McDONALD, JR.
902 Quinby Building
650 South Grand Ave.
Los Angeles 17, California
Attorneys for Petitioner

Of Counsel
RAY O. SAGE
105-½ So. Canyon
Carlsbad, New Mexico



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IN THE

Supreme Court of the United States

October Term, 1959

No.

UNITED STATES POTASH COMPANY,
DIVISION OF UNITED STATES
BORAX & CHEMICAL CORPORATION,
Petitioner,

v.

LOCAL 4912,
INTERNATIONAL ASSOCIATION OF MACHINISTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on September 2, 1959, reversing the judgment of the United States District Court for the District of New Mexico.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 270 F.

2d 496 and is reproduced in Appendix A to this Petition. The decision, findings of fact and conclusions of law of the district court are not reported but appear in the printed Transcript of Record on appeal at pp. 18-21.

JURISDICTION

The judgment of the Tenth Circuit was entered on September 2, 1959. (App. A, p. 6). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

In a suit by a union under Section 301(a) of the Labor Management Relations Act to compel arbitration of a dispute over the right of the Company to contract with an independent contractor for original construction and installation work at the premises of its mine where the agreement between the parties was silent on the subject:

1. Did the Tenth Circuit properly order arbitration when there was neither language in the agreement nor extrinsic evidence in the record showing that the Company had promised to arbitrate such dispute?

2. Did the Tenth Circuit use a proper standard for determining arbitrability when it stated that

> "... we cannot deny arbitrability unless we can say with positive assurance that the contract is not susceptible to an interpretation to cover the asserted dispute."?

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[1] References to appendices of this Petition hereinafter carry the designation "App."

[2] The printed Transcript of Record on appeal is hereinafter designated by the symbol "R."

3. Was it proper for the Tenth Circuit to rely upon the decisions of arbitrators in other cases in holding that the union recognition clause in this case was susceptible to an interpretation forbidding the contracting of original construction and installation work?

4. Was it proper for the Tenth Circuit to direct arbitration on the basis of an asserted interpretation of the union recognition clause where—

(a) Such interpretation had not previously been asserted in the grievance proceedings with the Company as required in the agreement, and

(b) The clause had not been relied upon by the Union in the United States District Court as a basis for enforcing arbitration?

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. §185), provides as follows:

> "Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF CASE

1. *The Facts* — The Petitioner, a company which operates a potash mine and refinery near Carlsbad, New Mexico,

and the Respondent, a labor organization, entered into a collective bargaining agreement on July 6, 1956 covering Company employees performing maintenance and repair work at the mine. (R. 1, 3, 5, 16, 18, 19). (The provisions of the agreement included in the record on appeal appear at R. 4-15 inclusive).

Between December 1, 1956 and April 4, 1957 the Company contracted with the Vasey Construction Company, an independent contractor, for certain new construction work and the installation of new machinery at the premises of the mine. The construction company used its own employees in the performance of the contract. (R. 1, 3-4, 16, 18-19).

On April 4, 1957 the Union filed with the Company a Grievance Report which asserted that the performance of such work by the independent contractor was "in violation of the schedule of job definitions in the current collective bargaining agreement between the parties" and which requested that certain unnamed Company employees be paid for a number of hours equal to those worked by employees of the construction contractor. (R. 15-16, 19-20). This grievance was processed as provided in the agreement and was finally denied by the Company. (R. 19-20, 51-53). On or about April 26, 1957 the Union requested that the grievance be submitted to arbitration. The Company declined on the ground that the dispute was not an arbitrable one under the agreement. (R. 4, 17). (The management functions article of the agreement appears at R. 5, the grievance and arbitration articles at R. 8-11).

On September 19, 1957 the Union filed a Complaint in the United States District Court for the District of New Mexico, under Section 301(a) of the Labor-Management Relations Act, requesting the court to compel arbitration

of the grievance, the Grievance Report being attached to and made a part of the Complaint. (R. 3-4). In its Answer the Company asserted that the Union's grievance was not subject to arbitration under the agreement. (R. 16-17).

2. *The Proceedings in the District Court* — The parties adduced evidence on the relevant collective bargaining history between the parties, their past practices under the agreement and prior agreements, and their intentions in entering into the agreement as expressed at the bargaining table. As shown by the Transcript of Record on appeal the Union relied throughout solely on the schedule of job definitions as a basis for enforcing arbitration. The court concluded that the agreement limited the scope of arbitration to such matters as were specifically covered by the agreement and that the subject of contracting for construction or for work was not arbitrable because not so specifically covered. (R. 20-21).

With respect to the schedule of job definitions, the district court found that it had been included in agreements between the parties continuously since 1948 and that its purpose was merely to provide an efficient means of allocating work among Company employees without dispute as to craft jurisdictional lines. (R. 18-19). The court also found that it had been the usual practice of the Company through the years to contract with independent contractors for substantially all original construction and original installation of machinery; that since 1948 the Union had filed but one grievance on account of contracting work and that arbitration of such grievance was not sought when the grievance was denied; that in the negotiation of contracts between the parties no discussion was ever had upon the subject of contracting work or contracting construction; that the agreement contains a "Management Functions Clause" which provides that only such matters

as are specifically provided for under the terms of the agreement are subject to arbitration; that the agreement contains no provision specifically relating to the subject of contracting construction; and that the contracting of work was done in good faith and for valid business purposes and without intent to injure the Union. (R. 19-20). On appeal the Union excepted to none of the findings.

3. *The Decision of the Tenth Circuit* — In the Tenth Circuit the Union abandoned its position that the schedule of job definitions prohibited the Company from contracting work with independent contractors. It urged a new basis for arbitration, not asserted in the grievance proceedings or in the district court. It contended that the union recognition clause by implication forbade the Company from contracting out the work in dispute. The Tenth Circuit reversed the district court and held that the grievance was subject to arbitration.

In its opinion the Tenth Circuit first referred to the "restrictive language" of the management functions and arbitration articles of the agreement. It said

> "The agreement conventionally provided, in the 'Management Functions Article,' that 'all matters relating to this Company and its operations and employment with or by this Company . . .' are exclusively within the jurisdiction of the Company and not subject to union action or consent or to arbitration, except such . . . conditions of employment affecting the employer-employee relationship as are specifically provided for in the terms of this agreement . . .'; and, in the 'Arbitration Article', that 'only a question or questions as to the proper interpretation or application of any of the provisions of this agreement may be submitted to arbitration'." (App. A, pp. 1-2).

The court then noted that

> "since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. Our province then is to decide the threshold question whether the employer has promised to submit the asserted grievance to arbitration as one involving 'the proper interpretation or application of any of the provisions of this agreement.'" (App. A, p. 2).

After observing some of the "institutional characteristics" of collective bargaining agreements, the court stated that the judicial determination of "whether the employer has agreed to arbitrate the underlying grievance, necessarily involves a modicum of interpretation of the contract, and, to that extent overlaps the interpretive functions which primarily belong to the arbitrator." But the court added

> "We interpret only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract." (App. A, p. 4).

Turning its attention then to the grievance dispute over contracting work the court noted that "none of the provisions of the contract explicitly prohibit subcontracting, but that does not necessarily mean that subcontracting is excluded from the scope of the bargaining agreement." It said that the contract "leaves room for interpretive implications of coverage, to be derived from implied

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It is noteworthy that neither the grievance, nor the pleadings, nor the district court referred to the contracting with an independent contractor for construction work as "subcontracting." (R. 15, 3-4, 16, 19). The record shows that this was **not** "Subcontracting" as the term is generally used, nor did it represent work which was part of the regular jobs of Company employees.

covenants of good faith and fair dealings which are the very life blood of collective bargaining agreements." The court then laid down this standard for deciding the question of arbitrability:

> ". . . we cannot deny arbitrability unless we can say with positive assurance that the contract is not susceptible to an interpretation to cover the asserted dispute."

Finally, the court added "grievances do not lose their arbitrability because we think they can be correctly decided only one way." (App. A, p. 4).

In determining, within this context, whether the Union's grievance presented an arbitrable question the court relied upon the decisions of arbitrators involving other parties under other labor agreements. The court's reasoning was as follows:

> "In determining whether the grievance presents a problem of interpretation or application, it is competent, we think, to consider interpretations placed upon like contracts by arbitrators with primary responsibility for the interpretation of such contracts in the arbitral process. Reference to these decisions discloses that in a number of instances the conventional recognition clause, like ours, while not specifically excluding subcontracting, has been interpreted to forbid it on the grounds that it had the effect of destroying or injuring the union as an effective bargaining unit. And, this conclusion was reached without contradicting the restrictive management function provisions of the agreement. Electric Auto-Lite Co., 30 LA 449; American Cyanamid Co., 13 LA 562; In re Mandel Laces, Inc., 27 LA 440; National Tube Co., 17 LA 790; Carbide & Carbon Chemicals Co., 26 LA 74; Celanese Corp. of America, 14 LA 31; A. D. Juilliard Co., Inc., 21 LA 713. . . . . .

. . . . . .

To be sure, there are cases holding quite to the contrary. See Amalgamated Assn. of Street, Electric Ry., etc., v. Greyhound Corp., 5 Cir., 231 F. 2d 585, 57 A.L.R. 2d 1394. And see also cases collected Annot. 57 A.L.R. 2d 1399.

But, it is not for us to resolve the contrariety or to choose between the courts and the arbitrators. It is enough that the contrariety raises a question as to the proper interpretation or application of the contract — a function which belongs to the arbitrator. Without more, it is plain that the grievance dispute does not lie wholly outside the provisions of the contract, and arbitration is therefore enforceable.'" (App. A, p. 5).

In reaching the foregoing conclusion the court in its opinion ignored the findings and conclusions of the district court, the restrictive language of the management function and arbitration articles of the agreement and the several federal court decisions which had reached opposite conclusions in similar cases.[1]

REASONS FOR GRANTING THE WRIT

1. *The Decision of the Tenth Circuit Will Have Far Reaching Effects in Industry* — In holding that the Company must arbitrate the grievance dispute over contracting original construction and installation work, the court relied upon two admittedly "conventional" clauses in the agreement. The *first* was the arbitration clause which provided that —

". . . only . . . a question or questions as to the proper

[1] An examination of the arbitration cases cited by the court will reveal striking differences from the facts in this case.

See cases cited **infra** under point 4A.

> interpretation or application of any provision of this agreement, may be submitted to arbitration . . ." (R. 10)[2]

and the *second* was the union recognition clause which stated —

> "The Company recognizes the Union as the exclusive representative for the purpose of collective bargaining . . . for all employees of the Company in the Mine Division of the Company in the job classifications of Journeyman Carpenter, Journeyman Maintenance Mechanic . . ." etc. (R. 4-5)

The Tenth Circuit held that the Company must arbitrate the dispute because the court could not say with "positive assurance" that the recognition clause was "not susceptible" to an interpretation which would forbid contracting the disputed work to an independent contractor.

It was of no apparent significance to the court in reaching its decision that the Union represented employees engaged in maintenance and repair work (R. 5)[3] at the Company's mine and that the facts found by the district court and not excepted to by the Union showed that —

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[2] The conventional character of this arbitration clause cannot be gainsaid. Consult Cox, **Reflections Upon Labor Arbitration,** 72 Harv. L. Rev. 1482, 1497 (1959); Shulman, **Reason, Contract, and Law in Labor Relations,** 68 Harv. L. Rev. 999, 1008 (1955); Commerce Clearing House, **Union Contract Clauses** 597 (1954).

This provision is but a customary expression of the employer's obligation under Secs. 7, 8(5) of the National Labor Relations Act, as amended. Consult Commerce Clearing House **Union Contract Clauses** 59 et seq. (1954).

[3] The maintenance character of the unit is further shown by the original certification proceedings. Consult Cases Nos. 16 E-R-24, 16 E-R-25, 16 E-R-26, 16 E-R-27, 16-E-R-28, 33-UA-42 before the National Labor Relations Board, 1947-48, including "Order Reopening Record and Referring Proceeding to Regional Director" (Feb. 24, 1948); and "Decision, Direction of Elections and Order" (May 25, 1948).

(a) The grievance dispute was over original construction and installation work, and it had been the usual practice of the Company through the years to contract substantially all of such work with independent contractors;

(b) The agreement was completely silent on the subject of contracting work with independent contractors;

(c) There had never been any discussion in negotiations between the Company and the Union upon the subject of contracting work;

(d) Since the beginning of the bargaining history of the parties in 1948 the Union had filed but one grievance on account of contracting work, the grievance being denied by the Company and the Union not requesting arbitration;

(e) The contracting which gave rise to the grievance dispute was done in good faith and for valid business purposes and without intent to injure the Union. (R. 19-20, 22).

Nor, evidently, did the Tenth Circuit deem it consequential that the management functions clause limited arbitration to "matters of employment, rates of pay, wages, hours of employment, and other conditions of employment affecting the employer-employee relationship *as are specifically provided for in the terms of the agreement.*" (Emphasis supplied) (R. 5)

Finally, in evaluating the bona fides of the Union's claim for arbitration the Tenth Circuit gave no apparent heed to the fact that upon losing in the district court the Union shifted the basis for its claim that the contract prohibited contracting out from the schedule of job definitions to the union recognition clause.

Because both the recognition and arbitration clauses in this case are conventional, the holding in this case could

have far-reaching effects on labor-management relations in the United States. The holding would require every manufacturing, mining or other industrial concern with a labor agreement containing conventional recognition and arbitration clauses to submit to arbitration upon request by the union any dispute over contracting out work including original construction and installation (assuming the employer could not show with "positive assurance" that the recognition clause was not "susceptible to an interpretation to cover the asserted dispute"). Yet it is traditional for industrial plants to contract with construction concerns for the performance of original construction and installation work.*

2. *The Method By Which The Tenth Circuit Determined Arbitrability Is Inappropriate Under Section 301(a) And Will Adversely Affect The Processes Of Collective Bargaining And Arbitration* — Section 301(a) authorizes only "suits for violation of contracts between an

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*A recent study published by the Graduate School of Business of Columbia University states that 8 out of 10 of a carefully selected sample of 74 large industrial plants contract out **all** major construction work. Chandler and Sayles, **Contracting Out** pp. 9, 11 (1959.)

Arbitrator Whitley P. McCoy, former Director of the Federal Mediation & Conciliation Service, observed in a recent decision: "[T]he average manufacturer is not in the building and construction business. When he decides to expand his plant, adding a new wing or a new building, he naturally contracts that construction work out. In the absence of an express contract limitation or prohibition against such action, he is not violating the collective bargaining contract because he and the Union did not bargain with respect to such work. The mere fact that he employs a maintenance force, which, if expanded, might possibly do the work of building a new building, does not alter the fact that the parties did not contract with reference to such construction work. So also, the average manufacturer does not manufacture his own machinery, or boilers, etc. When he has to purchase such major equipment he may find it necessary to have the vendor install it. Here again there is no violation of the collective bargaining contract, because the parties to that contract did not have such work in mind and did not bargain with respect to it." **Pet Milk Co.**, 33 LA 278, 279 (1959).

Because construction work on industrial plants has traditionally been performed by the building trades unions the decision of the Tenth Circuit may well have the effect of creating a jurisdictional struggle between industrial unions and the building trades.

employer and a labor organization . . ." Therefore, it is incumbent upon the party requesting a federal court to compel arbitration of a dispute to show "that the defendant has contracted to refer such issue to arbitration, and has broken this promise. . . ." *Local 149, Engineers AFL v. General Electric Co.*, 250 F. 2d 922, 927, 1st Cir., 1957, *cert. denied* 356 U. S. 938, 78 S. Ct. 780, 1958. Other circuits which have considered the question are in accord with the First Circuit. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 269 F. 2d 633, 5th Cir., 1959, *UAW v. Benton Harbor Malleable Industries*, 242 F. 2d 536, 6th Cir., 1957, *cert. denied* 355 U. S. 814, 78 S. Ct. 15, 1957; *Engineers Association v. Sperry Gyroscope Co.*, 251 F. 2d 133, 2nd Cir., 1957, *cert. denied* 356 U. S. 932, 78 S. Ct. 774, 1958. Even the Tenth Circuit, in the forepart of its opinion, appears to recognize the need for such a showing in a suit under Section 301(a). (App. A; p. 2).

But in this case there was neither language in the agreement nor extrinsic evidence in the record showing that the Company had promised to arbitrate a dispute over contracting work to independent contractors. After stating that "we interpret only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract," the court announced flatly that ". . . . we cannot deny arbitrability unless we can say with positive assurance that the contract is not susceptible to an interpretation to cover the asserted dispute." (App. A, p. 4). With the use of these standards and in reliance upon certain arbitration decisions the Tenth Circuit presumably found the necessary promise to arbitrate.

The Company promised to arbitrate ". . . only questions as to the proper interpretation or application of any of the provisions of this agreement . . ." (R. 10) but limited

to "such matters of employment . . . as are specifically provided for in the terms of this agreement." (R. 5, 20). The Company did *not* agree to arbitrate every dispute provided only that it can be "fairly said to present a question as to interpretation." Nor did the Company promise to arbitrate any grievance dispute over an asserted interpretation by the union unless it can be said with "positive assurance that the contract is not susceptible to an interpretation to cover the asserted dispute."

Under the standards of the Tenth Circuit the contract has been opened up to unlimited possibilities of arbitration far beyond anything agreed to by the parties.

Moreover, by the standards adopted the court departs from the traditional rule that a party seeking specific performance of an agreement bears the burden of proving that the defendant has covenanted to do the thing which is sought to be enforced and has broken his promise. The court has shifted the burden of proof from the party seeking injunctive relief to the party resisting it. The court achieves this by stating that the grievance dispute will be ordered to arbitration unless the court can say with "positive assurance" that the contract is "not susceptible" of the asserted interpretation. Of course, the plaintiff is not going to show—either with "positive assurance" or otherwise—that the contract is not susceptible of the interpretation which he asserts. Hence, arbitration will be ordered unless the defendant produces such proof.

We believe that the Tenth Circuit's standards for determining arbitrability are without judicial precedent, however the court's approach is not unlike that which has been recently advocated by Professor Archibald Cox, Pro

fessor of Law at Harvard Law School.[3] Moreover, the Tenth Circuit's reliance on arbitration awards as a basis for construing and enforcing agreements to arbitrate under Section 301(a) is unprecedented and is clearly contrary to the effect given such decisions by the Fifth Circuit in *Refinery Employees* v. *Continental Oil Co.*, 268 F. 2d 447, 5th Cir., 1959, *cert. denied* Nov. 16, 1959, Docket No. 417. This conflict is briefly discussed below under point 4D.

If, as Petitioner contends, the standards adopted by the court under Section 301(a) compel arbitration where it has not been promised, arbitration ceases to be consensual and becomes compulsory. Such a result can hardly be justified under a statute which limits a litigant to "suits for violation of a contract." Cf. Wellington, *Judge Magruder and the Labor Contract*, 72 Harv. L. Rev. 1268 (1959).

If we are correct in asserting that the effect of the

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[3] In a recent speech before the National Academy of Arbitrators Professor Cox, analogizing from the test for federal question jurisdiction in the federal courts, advocates that arbitration should be ordered under Section 301 whenever the grievance "might fairly be said to fall within the scope of the collective-bargaining agreement." Cox, **Reflections Upon Labor Arbitration**, 72 Harv. L. Rev. 1482, 1510 (1959). The fallacy in Cox's well publicized views as to what constitutes wise policy under Section 301 was shown by Judge Magruder and the First Circuit in **Local 149, Engineers v. General Electric Co.**, 250 F. 2d 922, 926-27, 1st Cir. 1957, cert. denied 356 U. S. 938, 1958, where, after discussing the views of Cox and others in "responsible quarters" regarding the peculiarities of the collective bargaining agreement the court said:

"While not ignoring the force of these considerations, it seems to us that they would be persuasive not so much in a case like the present, but rather in inducing the parties to make a voluntary submission to arbitration, and in inducing the parties to include terms in a collective bargaining agreement giving wide scope to the questions to be submitted to arbitration.

"But when one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise."

court's holding is clearly to enlarge the promises of the parties to arbitrate, it could have grave consequences upon the collective bargaining process were the Tenth Circuit's view to become established law under Section 301(a). Rather than face a vast unknown in arbitration one may reasonably predict that management will seek either to eliminate the arbitration clause completely or to limit it specifically. In the collective bargaining process there have been innumerable rights which management has been unwilling to give up or to make subject to veto or review by an arbitrator. Management cannot now lightly accept the existence of an unlimited power in the arbitrator to take away these rights. It would be inevitable that in the bargaining process management would seek to recover free from arbitration the rights which it never intended to give up and the unions would seek to retain what the court has given them. The resulting conflict could create a major crisis in industrial relations.

Moreover, the standard used by the court would place an unnecessary burden on the bargaining process. Assuming as we must that the "limitations" on arbitration are as important to the parties as the "affirmations". (Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1505) each provision of an existing or proposed agreement would necessarily be tested by the parties to determine whether it could be said with positive assurance that it was not susceptible to some unacceptable interpretation the other party might assert.

If the national policy is to promote collective bargaining and relies upon the arbitral process as a major means of settling industrial disputes arising out of agreements, contracts should be interpreted to reflect honestly the intent of the parties. See *Refinery Employees*, supra, where the Fifth Circuit said:

"A contract is before us, a firm agreement presumably made after the usual labor-management negotiations. It is important to labor and management to have a collective bargaining agreement enforced according to the intention of the parties, shielded against the risk of an arbitrator's abuse of authority arising out of a possible predilection for arbitration. The parties are free to bargain as to the width of the coverage of an arbitration clause but, in the absence of an express provision allowing the arbitrators to decide arbitrability, courts must determine the scope of the arbitration clause . . ." 268 F. 2d at 452-453.

But the Tenth Circuit never inquired into the intent of the parties. Certainly the court would have reached a different result had it resolved the question of arbitrability by traditional means, that is, concluding on the basis of evidence presented by the parties whether or not the Company had promised to arbitrate the dispute and had breached its promise.

3. *The Action of the Court was Violative of Sound Principles of Jurisprudence* — When the grievance dispute was processed through the agreement grievance procedures and in the proceedings in the district court the Union relied exclusively on the the schedule of job definitions as prohibiting the Company from contracting the work in dispute. In the Tenth Circuit the Union contended for the first time that the union recognition clause could be interpreted to prohibit contracting out.

A. Article XIX of the agreement provides in Para. 1, clause 2 that "no such question or questions [of interpretation or application] may be submitted to arbitration unless agreement or settlement cannot be reached by any other applicable method provided in this agreement." (R. 10) This clearly required that the asserted interpretation of the recognition clause be processed through the grie-

vance procedures as a condition precedent to the right of arbitration.

In *Boston Mutual Life Insurance* v. *Insurance Agents*, 258 F. 2d 516, 1st Cir., 1958, the First Circuit in vacating the district court's order directing arbitration of a grievance over the alleged wrongful discharge of an agent, held that "... whether the Employer had agreed to submit this matter to arbitration depends upon a determination by the court, as a preliminary matter, whether all the conditions precedent to arbitration have been fulfilled. ..." 258 F. 2d at 522. Accord: *Operating Engineers* v. *Monsanto Co.*, 164 F. Supp. 406, W.D. Ark., 1958. Compare *Goodall-Sanford* v. *Textile Workers*, 233 F. 2d 404, 1st Cir., 1956, *affirmed* 353 U. S. 550, 77 S. Ct. 920, 1957. The First Circuit would not itself first determine whether the Union there had fulfilled the conditions precedent for arbitration (requesting arbitration with due diligence) but rather remanded the case to the district court for determination of this issue, stating that the "union [was] free to offer evidence in extenuation of its long delay." Here, the Tenth Circuit ordered arbitration of a question of contract interpretation where the record shows on its face that the conditions precedent had not been satisfied.

B. Furthermore, the Tenth Circuit without the guidance of extrinsic evidence interpreted the union recognition clause as being susceptible of a construction which would prohibit the Company from contracting out the work in dispute. If, as the court asserted, no collective bargaining agreement can be properly interpreted without a full understanding of its "institutional characteristics" it would seem to follow that the Tenth Circuit committed further error in carrying out its interpretive function in a vacuum. Petitioner submits that before the court could imply a promise varying the plain meaning of the union

recognition clause proof should have been taken on the issue of the meaning of the clause.

4. *The Decision of the Tenth Circuit Conflicts in Several Important Respects with Decisions of Other Circuits in Suits to Enforce Agreements to Arbitrate Under Section 301(a).*

A. First, the decision of the Tenth Circuit cannot be reconciled with the holding and the reasoning of the Fifth Circuit in *United Steelworkers* v. *Warrior & Gulf Navigation Company*, 269 F. 2d 633, 1959, petition for cert. filed Sept. 30, 1959, where the facts are strikingly similar to those in this case.

Warrior & Gulf was engaged in the transportation by barge of products and materials used in the manufacture of steel and operated a maintenance and repair yard. The Union sought arbitration of a grievance which asserted that the company in contracting with other yards to perform maintenance work on its barges when a number of its own maintenance employees were on layoff was "discriminatory" as against union members and constituted a "partial lockout" contrary to the terms of their agreement. The arbitration section in part provided:

> "Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.
>
> "Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, . . . [provision for arbitration follows]."
> 269 F. 2d at 635-636.

In affirming the judgment of the district court that the dispute was not arbitrable the Fifth Circuit relied

first on its decision in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Greyhound Corporation*, 231 F. 2d 585, 5th Cir., 1956, and ruled that the matter of contracting out work remained "strictly a function of management" because the contract did not specifically "deal with the power of the employer to contract with others to perform services previously done by its employees" and the court would not imply any limitation on management's power in this respect.

Reported federal district court decisions under Section 301(a) are unanimously in accord with *Warrior & Gulf* in denying arbitration in the absence of a specific provision on contracting out, and in each case the arbitration provisions have been broader than in the present case. *Petroleum Workers v. Standard Oil Co.*, N. D. Ind., __ F. Supp. __, 44 LRRM 2676, 1959; *Dairy, Bakery and Food Workers Local 286 v. Grand Rapids Milk Division*, W. D. Mich., 160 F. Supp. 34 (1958); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Eastern Mass. Street Railway Co.*, D. Mass., 162 F. Supp. 942 (1958).

The Fifth Circuit also emphasized that the language of the contract relied upon by the union did not show that the company had agreed to arbitrate a dispute over contracting out work:

> ". . . . . [I]t is plain that characterizing this action as 'discriminatory' is not sufficient to bring it within the

Motor Coach Employees case raised the question of whether the employer had the right to lay off a group of janitorial employees covered by the collective bargaining agreement and hire the services of an independent contractor in their place where the contract was silent on the subject. In unanimously affirming the judgment of the district court in granting the Company's motion for summary judgment the Fifth Circuit stated:

> "that the type of limitation on management's freedom of operation urged here will not be implied merely from the fact that the parties agreed on terms and conditions covering the jobs in question" 231 F. 2d at 587.

prohibition of the contract which forbids 'discrimination against any member of the Union.' This is so because there is no discrimination charged in the grievance except that the contracting out occurred at a time when there 'are a number of employees that have laid off for about 1 1/2 years or more allegedly because of lack of work.' Nor does the characterization of the Company's action as a 'partial lockout' bring it within the language of the section making a 'lockout on the part of the Company' a violation of the agreement. Any contention that such action as is here criticized amounts to what is known in labor-management relations as a 'lockout' is clearly a simple play on words and is insubstantial." 269 F. 2d at 637.

For the reasons indicated the Fifth Circuit would have declined to order arbitration here because *first*, there was no language in the agreement "dealing with the power of the employer to contract with others" and, *second* because the contention that contracting out work violated the "union recognition" clause was an unsupported assertion (in the language of the Fifth Circuit) "to set the complaint within a frame of reference comprehended by the agreement to arbitrate." 269 F. 2d at 637. Moreover, the present case presents an *a fortiori* situation to *Warrior & Gulf* in that here the arbitration provisions were more restrictive and the work contracted was not work usually performed by the employees represented by the grieving union."

"The district court in **Warrior & Gulf Navigation** found that the Steelworkers had sought unsuccessfully to negotiate a contract limitation on the right of the company to contract maintenance work, but the Fifth Circuit indicated that this finding was not necessary to its decision.

It will be noted in addition that in **Warrior & Gulf Navigation**, as here, the union raised in the circuit court for apparently the first time the contention that contracting out violated the union recognition clause. Unlike the Tenth Circuit, however, the majority in the Fifth Circuit did not consider any basis for arbitration not previously raised. See the dissent of Judge Rives.

B. The approach of the Tenth Circuit in determining arbitrability is squarely at odds with that of the First Circuit in *Local 201, I.U.E.* v. *General Electric Co.*, 262 F. 2d 265, 1st Cir., 1959, and *Local 149, Engineers AFL* v. *General Electric Co.*, 250 F. 2d 922, 1st Cir., 1957, *cert. denied* 356 U. S. 938. In *Local 201* the union sought to enforce arbitration of a grievance of an employee who was transferred from a certain shift to fill an identical job on another shift, the union relying upon the seniority clause as the basis for its claim that the transfer was improper. Noting that the agreement provided for the arbitration of any grievance involving "the interpretation and application of a provision of this agreement" the court, speaking through Chief Judge Magruder, concluded that the dispute was not arbitrable on the following reasoning:

> "Since under the particular agreement the court must preliminarily determine whether respondent has promised to submit Graciale's grievance to arbitration as involving 'the interpretation or application of a provision of this Agreement,' it is not enough that appellant local may *claim* that the Graciale grievance necessitates the interpretation or application of the seniority provisions of Art. IX. *The court must be satisfied that this claim is well founded, that is, that the arbitrator can use those provisions as a controlling statute to decide the merits of the grievance.* . . (Emphasis supplied). . . . . .
>
> "But there is absolutely no language in [the seniority provisions] which confers a *shift preference* based upon seniority. This conclusion is consistent with certain unrebutted testimony by Company officials to the effect that there had been negotiations concerning shift preference and that some of the local agreements provided for such preference, but that the Company had refused to agree to shift preference . . . (Original italics). . . . . .

> Nor could it even be contended here that an arbitrator might make an award in favor of Graciale based upon normal practice at the plant constituting an implied local supplementary agreement . . . . there [is] no allegation or shred of evidence that the local practice at the West Lynn plant is based upon a recognition of shift preferences. . . ." 262 F. 2d at 271-272.

Here the First Circuit emphasized the need for basing the arbitration claim upon "controlling" language in the agreement. To the same effect see *New Bedford Defense Products Division v. Local No. 1113*, 258 F. 2d 522, 1st Cir., 1958. And where the plaintiff contended the language should be given a meaning in addition to that provided on its face in order to try to bring the dispute within the agreement to arbitrate, the First Circuit tested the Union's contention against the extrinsic evidence which had been introduced at the trial in the district court. Had the Tenth Circuit approached the present case in the same manner, it would not have ordered arbitration because there was no "controlling statute" to decide the merits of the grievance. There was only an unsupported assertion that the union recognition clause implied a covenant against contracting work.

In *Local 149, Engineers AFL v. General Electric Co.*, supra, the union sought to compel the employer to arbitrate a dispute over whether jobs performed by certain employees were incorrectly graded under the agreement and consequently assigned wrong job rates. The court, again speaking through Chief Judge Magruder, after admitting that it was "much perplexed by this case" concluded that:

> "[F]ocusing our attention exclusively on the language of Section 301(a), it is obvious that the plaintiff, in a suit under Section 301(a), has the burden of estab-

lishing that it is bringing a suit for appropriate relief, legal or equitable, for violation of a term of a collective bargaining agreement; and that therefore the district court, before undertaking to decree specific performance of a contract for arbitration, must necessarily first determine, as a matter of law, whether the alleged refusal to arbitrate is a violation of any term in the collective bargaining agreement. . . . . .

. . . . . .

[F]undamentally what is submitted to arbitration is defined in [the agreement] as 'Any grievance which involves the interpretation or application of this Agreement.'" 250 F. 2d at 929-930.

It then denied arbitration because

". . . the collective bargaining agreement contains absolutely no language by way of job descriptions which could be interpreted or applied for the purpose of determining whether the duties performed by a particular employee fall within any particular grade." 250 F. 2d at 930.

On the basis of *Local 149* it is again clear that the First Circuit, following conventional canons of construction, would have denied arbitration in the present case. There is "no language" in the agreement "to be interpreted and applied for the purpose of determining" whether the company violated the agreement by contracting work and there is no evidence in the record to show that the union recognition clause relied upon by the Tenth Circuit was intended by the parties to cover a grievance dispute over contracting work.

On the other hand the Tenth Circuit, under the novel approach which it adopted in this case, would have ordered arbitration in *Local 149*. It rejects the need for explicit language as a basis for arbitration. It states: "It would stifle the underlying purposes of the whole agreement to

construe it according to its dry words. It is for us to put meat on the skeleton rather than tear the flesh from the bones." (App. A, p. 4). Concluding that the agreement "leaves room for interpretive implications of coverage" it proceeded to find the recognition clause susceptible to a meaning asserted by the Union without any extrinsic evidence.

C. The Fifth Circuit in *Warrior & Gulf Navigation*, supra, and the Second Circuit in *Sperry Gyroscope*, supra, appear to follow closely the doctrine of the First Circuit in requiring that the plaintiff in a suit to enforce arbitration under Section 301(a) show that the agreement contains language to govern the disposition of the grievance dispute. These courts take the view that in the absence of such language a refusal to arbitrate cannot be shown to constitute a breach of the agreement. It is not enough merely to assert or contend that a contract provision means something in addition to or outside of its plain language. This approach necessarily means that these courts would examine, to the extent necessary, the meaning of substantive provisions relied on as a basis for arbitration to determine if such provisions do so relate to the grievance dispute as to bring it within the scope of the undertaking to arbitrate. On the other hand, the Tenth Circuit would not require that the court decide positively whether any provision in the agreement relates to the grievance dispute. Rather, with an overriding determination not to prejudice the disposition of the dispute on its merits the Tenth Circuit would practice "judicial abnegation" in favor of the arbitrators who have "primary responsibility for the interpretation of such contracts in the arbitral process." (App. A, p. 5).

D. The decision of the Tenth Circuit creates yet another important conflict among circuits with far-reaching

implications for the orderly development of federal substantive law under Section 301(a).

In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 77 S. Ct. 912, 1957, this Court in discussing the possible sources of federal substantive law to apply in suits to enforce arbitration under Section 301(a) said nothing with respect to the status of arbitration decisions. Here the Tenth Circuit relied upon arbitrator's awards in other disputes under other agreements in holding that the recognition clause was susceptible to an interpretation covering the grievance—in effect making arbitration decisions an independent source of private rights under Section 301(a). This reliance on arbitration awards as a basis for construing and enforcing agreements to arbitrate under Section 301(a) is unprecedented and was rejected by the Fifth Circuit in *Refinery Employees* v. *Continental Oil Co.*, 268 F. 2d 447, 5th Cir., 1959, where that court held that the agreement did not provide for arbitration of the matter of a remedy for misassigned overtime. The court reached this result after acknowledging and documenting in a footnote that in comparable cases "few arbitrators . . . have had any doubts as to the extent of their jurisdiction in awarding damages for breach of contract." 268 F. 2d at 455. Judge Brown observed in his dissenting opinion that exercising the "judicial inventiveness" presumably allowed by the Supreme Court in *Lincoln Mills* "would require that we at least give something more than a deferential footnote citation . . . to a respectable and substantial body of reported arbitration decisions as a source of learning and enlightenment." 268 F. 2d at 461.

The difference between the Tenth and Fifth Circuits regarding the use of arbitration decisions constitutes a further reason why this Court should define the function

of the federal judiciary in suits to compel arbitration under Section 301(a).

CONCLUSION

Petitioner submits that the Tenth Circuit's approach in the present case constitutes a misapplication of this Court's *Lincoln Mills* decision and an abdication of the responsibility which Congress placed upon the federal judiciary when, in enacting Section 301, it expressed its judgment that courts were competent to interpret and construe collective bargaining agreements. Whether Petitioner is correct or not in this assertion, in view of the vast amount of litigation on arbitrability the resolution by this Court of the basic conflict presented by this case would appear to be vital both to the orderly development of federal law under Section 301 and to the cause of industrial peace.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

RUFUS G. POOLE
ROBERT C. POOLE
Suite 715, Simms Building
Albuquerque, New Mexico
RAY J. COLEMAN
EDWIN A. MCDONALD, JR.
902 Quinby Building
650 South Grand Ave.
Los Angeles 17, California
Attorneys for Petitioner

Of Counsel
RAY O. SAGE
105-½ So. Canyon
Carlsbad, New Mexico

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6021 — May Term, 1959

LOCAL 1912, INTERNATIONAL ASSOCIATION OF MACHINISTS,
Appellant.

v.

UNITED STATES POTASH COMPANY, DIVISION OF UNITED STATES BORAX & CHEMICAL CORPORATION,
Appellee.

Appeal from the United States District Court for the District of New Mexico

(September 2, 1959)

Before MURRAH, *Chief Judge*, and PICKETT and BREITENSTEIN, *Circuit Judges*.

MURRAH, *Chief Judge*: The appellant Union brought this suit under Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 USCA 185, to compel arbitration of a grievance as arising out of a collective bargaining agreement with the appellee-employer. The agreement conventionally provided, in the "Management Functions Article", that "all matters related to this Company and its operations and employment with or by this Company * * * are exclusively within the jurisdiction of the Company and not subject to

Union action or consent or to arbitration, except such * * * conditions of employment affecting the employer employee relationship as are specifically provided for in the terms of this agreement * * *"; and, in the "Arbitration Article", that "only a question or questions as to the proper interpretation or application of any of the provisions of this agreement may be submitted to arbitration." The grievance arose out of the subcontracting of work by the employer on its premises which fell within the employee job classification set up in the contract.

Relying on the restrictive language of the foregoing Management Functions and Arbitration Articles of the agreement, the employer at all times refused to arbitrate the grievance on the grounds that it was not covered by any of the provisions of the bargaining contract, and therefore did not involve the interpretation or application of any such provisions, and answered accordingly. The trial court agreed with the employer, holding that the grievance was not covered by the contract and the Union was therefore not entitled to the relief sought.

Since Textile Workers v. Lincoln Mills, 353 U. S. 448, the district courts are empowered under Section 301(a), supra, to decree specific performance of an agreement to arbitrate a grievance dispute according to federal notions of equity jurisprudence. But since arbitration is voluntary and consensual in nature, warrant therefor must be found within the terms and conditions of the bargaining agreement. Our province then is to decide the threshold question whether the employer has promised to submit the asserted grievance to arbitration as one involving "the proper interpretation or application of any of the provisions of this agreement." See Local 201, etc. v. General Electric Co., 262 F. 2d 265.

It has been suggested in scholarly writings that labor relations is a world of its own and that "the law should

stay out"; that in any event, collective bargaining contracts are uniquely different from ordinary commercial contracts, and that different canons of interpretation should be employed in the decisional process; that labor contracts, being coercively arrived at, leave ambiguities and contingencies which require administrative interpretation for which judges, accustomed to conventional canons of construction, are "ill suited." And, we are urged to practice judicial abnegation lest our encroachments on the province of the arbitrator hinder the achievement of industrial peace through arbitration.

But whatever may be said of the competence or suitability of the judiciary to properly interpret and apply the provisions of a collective bargaining contract according to its tenor and underlying purposes, the fact remains that for good or evil, the courts have been Congressionally assigned the task of determining arbitrability under the pertinent provisions of the contract. Textile Workers v. Lincoln Mills, supra. We undertake our assigned task with no lack of appreciation of the laudable functions which collective bargaining agreements are intended to serve. We know that their principal objective is the promotion of industrial peace, and that arbitration is one of the chosen means of achieving that end. We understand that because of their institutional characteristics, bargaining agreements may be less distinct in the rights they are intended to grant and the obligations they intend to impose, and that negotiators at the bargaining table often leave much to pragmatic adjustments in post-contract collective bargaining.

Judicial determination of arbitrability, i.e. whether the employer has agreed to arbitrate the underlying grievance, necessarily involves a modicum of interpretation of

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See Sinulman, "Reason, Contract and Law in Labor Relations," 68 Harv L R 999, 1024.

Cox "Reflections Upon Labor Arbitration," 72 Harv L R 1482. Wellington "Judge Magruder and the Labor Contract," 72 Harv L R 1268.

the contract, and, to that extent overlaps the interpretive functions which primarily belong to the arbitrator. But, we do not reach the "ultimate issues of contract interpretation that determine the outcome of the controversy." Goodall-Sanford, Inc. v. United Textile Workers, 233 F. 2d 104, 107. We interpret only to determine whether the grievance dispute can be fairly said to present a question as to the interpretation or application of the contract. If so, the judicial function is at an end and the proper interpretation of the contract is for the arbitrator.

None of the provisions of the contract explicitly prohibit subcontracting, but that does not necessarily mean that subcontracting is excluded from the scope of the bargaining agreement. The contract is not couched in terms of specified grievances which are to be arbitrated, thereby excluding all others by implication. Nor does it specify the grievances which are not to be arbitrated, thereby including all others. See Lodge No. 12, etc. v. Cameron Iron Works, 257 F. 2d 467; Annot. 24 A.L.R. 2d 752. Instead, it leaves room for interpretive implications of coverage, to be derived from implied covenants of good faith and fair dealings which are the very life blood of collective bargaining agreements. Like every contract, there is a "covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." 3 Williston (Rev. Ed. 1936) § 670. It would stifle the underlying purposes of the whole agreement to construe it according to its dry words. It is for us to put meat on the skeleton rather than tear the flesh from the bones. In this context, we cannot deny arbitrability unless we can say with positive assurance that the contract is not susceptible to an interpretation to cover the asserted dispute. And, while we cannot take the word of the claimant, neither may we rely wholly upon our own judgment. For, grievances do not lose their arbitrability because we think they can be correctly decided only one way. New Bedford Defense Prod. Div. v. Local No. 1113, 160 F. Supp. 103, affmd. 258 F. 2d 522.

In determining whether the grievance presents a problem of interpretation or application, it is competent, we think, to consider interpretations placed upon like contracts by arbitrators with primary responsibility for the interpretation of such contracts in the arbitral process. Reference to these decisions discloses that in a number of instances the conventional recognition clause, like ours, while not specifically excluding subcontracting, has been interpreted to forbid it on the grounds that it had the effect of destroying or injuring the union as an effective bargaining unit. And, this conclusion was reached without contradicting the restrictive management function provisions of the agreement. Electric Auto-Lite Co., 30 LA 449; American Cyanamid Co., 13 LA 562; In re Mandel Laces, Inc., 27 LA 440; National Tube Co., 17 LA 790; Carbide & Carbon Chemicals Co., 26 LA 74; Celanese Corp. of America, 14 LA 31; A. D. Juilliard Co., Inc., 21 LA 713. In the latter case, the question for the arbitrator was whether the recognition clause, together with clauses setting forth standards for wages and working conditions, limited the company's right to lay off covered employees and transfer their work to noncovered employees of a third party. "After thoughtful consideration," the arbitrator concluded that to allow the employer to do so would subvert the contract and destroy the meaning of the collective bargaining relation." To be sure, there are cases holding quite to the contrary. See Amalgamated Assn. of Street, Electric Ry., etc. v. Greyhound Corp., 5 Cir., 231 F. 2d 585, 57 A.L.R. 2d 1394. And see also cases collected Annot. 57 A.L.R. 2d 1399.

But, it is not for us to resolve the contrariety or to choose between the courts and the arbitrators. It is enough that the contrariety raises a question as to the proper interpretation or application of the contract a function which belongs to the arbitrator. Without more, it is plain that the grievance dispute does not lie wholly outside the provisions of the contract, and arbitration is therefore enforceable. The case is accordingly reversed.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Local 1912, International Association of Machinists, appellant, have and recover of and from United States Potash Company, Division of United States Borax & Chemical Corporation, appellee, its costs herein and have execution therefor.